

## **PERSONNEL**

### **MERIT SYSTEM BOARD**

#### **Appeals, Discipline and Separations**

**Adopted Amendments: N.J.A.C. 4A:2-1.6, 1.7, 2.1, 2.2, 2.7, and 2.9.**

Proposed: November 21, 2005 at 37 N.J.R. 4345(a)

Adopted: June 21, 2006 by the Merit System Board, Rolando Torres, Jr., Commissioner,  
Department of Personnel.

Filed: , 2006 d. , without change, with the exception of N.J.A.C. 4A:2-2.10,  
which remains under review.

Authority: N.J.S.A. 11A:1-2(e), 11A:2-6, 11A:2-11(h), 11A:2-13 et seq., 11A:7-1 et seq.  
and 52:14B-10(c).

Effective Date: July 17, 2006.

Expiration Date: February 13, 2008

Summary of Hearing Officer Recommendations and Agency Responses:

A public hearing on the adopted amendments was held on December 15, 2005 in Trenton, New Jersey. Elizabeth Rosenthal served as hearing officer. No comments were received on the adopted amendments at that time, and no recommendations were made by the hearing officer. Two written comments were received. The record of the public hearing may be reviewed by contacting Henry Maurer, Director, Division of Merit System Practices and Labor Relations, Department of Personnel, P.O. Box 312, Trenton, New Jersey 08625-0312.

Summary of Public Comments and Agency Responses:

**COMMENT:** Sanford R. Oxfeld, Esq., representing the New Jersey Deputy Fire Chiefs Association (Deputy Fire Chiefs), commented that the proposed amendment to N.J.A.C. 4A:2-2.2(c), which states that the length of a suspension in a Final Notice of Disciplinary Action, a Merit System Board decision, or a settlement, when expressed in “days,” shall mean working days unless otherwise specified, is arbitrary, unfair, and inconsistent with the meaning of the word “days” elsewhere in the Department of Personnel’s regulations. Mr. Oxfeld objected to this amendment, noting that it would convert a suspension of 90 days from a three-month suspension to a suspension for 18 weeks.

**RESPONSE:** The proposed N.J.A.C. 4A:2-2.2(c) is aimed at providing clarity regarding

the precise length of a finite suspension, when such a suspension is expressed as a set number of “days” without any further specificity. The proposed amendment clarifies that the term “days” will uniformly be interpreted to mean working days, unless the Final Notice of Disciplinary Action, Merit System Board decision, or settlement specifies otherwise. The use of “working days” as the default is appropriate, since this measurement is the most accurate reflection of the actual number of days for which an employee is required to remain out of work. The concerns expressed by Mr. Oxfeld can be addressed by specifying in the Final Notice of Disciplinary Action, Merit System Board decision, or settlement, that a suspension will be measured in calendar days. Therefore, the Board has adopted these amendments as proposed.

**COMMENT:** Mr. Oxfeld opposed the proposed amendments to N.J.A.C. 4A:2-2.7(a)2 regarding treatment of employees who are indefinitely suspended, pending the disposition of criminal charges, and either enter the Pre-Trial Intervention (PTI) program or receive a conditional discharge. Mr. Oxfeld commented that the proposed amendments should not give appointing authorities unfettered discretion regarding whether to either continue the indefinite suspension until completion of PTI or until satisfaction of the conditions imposed in a conditional discharge, return the employee to employment, or initiate administrative disciplinary charges against the employee. He expressed concern that such discretion would be abused by appointing authorities and exercised for improper purposes. Mr. Oxfeld suggested that all employees who are indefinitely suspended and either enter PTI or receive a conditional discharge should be treated in the same manner, by being returned to work upon entry into PTI or receipt of a

conditional discharge.

**RESPONSE:** N.J.A.C. 4A:2-2.7(a)2 provides that an indefinite suspension extends until disposition of the criminal complaint or indictment, and the proposed N.J.A.C. 4A:2-2.7(a)2i clarifies that, in cases where an employee enters PTI or receives a conditional discharge in relation to pending criminal charges, the criminal complaint or indictment shall not be deemed disposed of until completion of PTI or until dismissal of the criminal charges due to the employee's satisfaction of the conditions in a conditional discharge. A plain reading of these provisions would *require* the continuation of an employee's indefinite suspension until completion of PTI or satisfaction of the conditions in a conditional discharge. This definition of "disposition" is also the Merit System Board's current practice, based on advice from the Attorney General's Office. However, recognizing that there may be circumstances where an employee's return to employment upon entry into PTI or receipt of a conditional discharge will not be detrimental, the proposed amendment to N.J.A.C. 4A:2-2.7(a)2ii provides the option of returning an employee to work prior to final disposition of the criminal complaint or indictment. Because the determination as to whether to continue the indefinite suspension, return the employee to work, or initiate administrative disciplinary charges requires an analysis of the specific circumstances of each case, that determination is best left to the appointing authority's discretion. It would not be appropriate to mandate an employee's return to work, pending completion of PTI or satisfaction of a conditional discharge, in every case because such a result would not, in most cases, be in the best interests of the public, the employer, or other employees.

**COMMENT:** Mr. Oxfeld endorsed the proposed N.J.A.C. 4A:2-2.10(d)3, which provides that a back pay award shall be reduced by the amount of money that is actually earned by an employee during the period of separation of employment, including any unemployment insurance benefits received. However, Mr. Oxfeld commented that this amendment appears to conflict with the proposed N.J.A.C. 4A:2-2.10(d)10, which provides that funds that must be repaid by the employee shall not be considered when calculating back pay. Mr. Oxfeld underscored that an employee is generally required to reimburse the Department of Labor and Workforce Development for any unemployment insurance benefits received if the employee subsequently is awarded back compensation for the period he or she received unemployment insurance benefits.

**RESPONSE:** Based on the comments received to the proposed N.J.A.C. 4A:2-2.10, the Merit System Board is not adopting these proposed amendments at this time. The proposed N.J.A.C. 4A:2-2.10 will remain pending in order that further review of the impact of these proposed amendments can be undertaken.

**COMMENT:** John P. Nuttall, Director, Office of Employee Relations, Department of Corrections, opposed the proposed amendments to N.J.A.C. 4A:2-2.10(d)3, which provide that, where a finite suspension is reversed or modified, only actual earnings during the period of the suspension shall be deducted from the employee's back pay award. Mr. Nuttall stated that to relieve an employee who has served a finite suspension of the duty to mitigate his or her damages by seeking employment is inconsistent with

current employment law standards and would have a negative economic impact on the Department of Corrections.

**RESPONSE:** Based on the comments received to the proposed N.J.A.C. 4A:2-2.10, the Merit System Board is not adopting these proposed amendments at this time. The proposed N.J.A.C. 4A:2-2.10 will remain pending in order that further review of the impact of these proposed amendments can be undertaken.

**COMMENT:** Mr. Oxfeld strongly opposed the proposed amendments set forth at N.J.A.C. 4A:2-2.10(d)4, which permit a reduction in a back pay award where an employee is unemployed or underemployed for all or part of a period of separation and fails to make reasonable efforts to find suitable employment during the period of separation. Mr. Oxfeld commented that the reduction of a back pay award by anything other than actual earnings during the separation period is not required by the statutory scheme, and he expressed that employees should not be obligated to search for substitute employment when they are in the process of challenging a disciplinary action against them.

**RESPONSE:** Based on the comments received to the proposed N.J.A.C. 4A:2-2.10, the Merit System Board is not adopting these proposed amendments at this time. The proposed N.J.A.C. 4A:2-2.10 will remain pending in order that further review of the impact of these proposed amendments can be undertaken.

**COMMENT:** Mr. Oxfeld expressed concern that the vague terms in the proposed

amendments to N.J.A.C. 4A:2-2.10(d)4, such as “underemployed,” “reasonable efforts,” and “suitable employment,” unnecessarily invite litigation.

**RESPONSE:** Based on the comments received to the proposed N.J.A.C. 4A:2-2.10, the Merit System Board is not adopting these proposed amendments at this time. The proposed N.J.A.C. 4A:2-2.10 will remain pending in order that further review of the impact of these proposed amendments can be undertaken.

**COMMENT:** Mr. Oxfeld commented that the phrase “unreasonable delay” as used in the proposed amendment to N.J.A.C. 4A:2-2.10(d)8 is vague. He specifically questioned whether an attorney’s schedule or unavailability would be considered an unreasonable delay of the appeal proceedings, which would warrant a reduction of a back pay award.

**RESPONSE:** Based on the comments received to the proposed N.J.A.C. 4A:2-2.10, the Merit System Board is not adopting these proposed amendments at this time. The proposed N.J.A.C. 4A:2-2.10 will remain pending in order that further review of the impact of these proposed amendments can be undertaken.

**COMMENT:** Mr. Nuttall opposes the proposed amendment to N.J.A.C. 4A:2-2.10(d)8, which specifies that delays in the appeal proceedings caused by an employee’s representative may not be considered in reducing an award of back pay. Mr. Nuttall contends that there is no practical difference between an employee or his or her attorney or union representative requesting a postponement of a disciplinary hearing. He suggests that the proposed amendment is not mandated by In the Matter of Frank Hoffman v.

Hudson County Department of Public Safety, Docket No. A-4124-96T2 (App. Div. June 22, 1999), cert. denied, 163 N.J. 80 (2000), and it will be the frequent subject of abuse by employees and their representatives.

**RESPONSE:** Based on the comments received to the proposed N.J.A.C. 4A:2-2.10, the Merit System Board is not adopting these proposed amendments at this time. The proposed N.J.A.C. 4A:2-2.10 will remain pending in order that further review of the impact of these proposed amendments can be undertaken.

#### Federal Standards Statement

A Federal standards analysis is not required because the adopted amendments are not subject to any Federal requirements or standards.

Full text of the adopted amendments may be found in the New Jersey Administrative Code at N.J.A.C. 4A:2.



#### **4A:2-1.6 Reconsideration of decisions**

(a) [Upon the] Within 45 days of receipt of a decision, a party to the appeal may petition the Commissioner or Board for reconsideration.

(b) A petition for reconsideration shall be in writing signed by the petitioner or his or her representative and must show the following:

1. The new evidence or additional information not presented at the original proceeding which would change the outcome and the reasons that such evidence was not presented at the original proceeding; or

2. That a clear material error has occurred.

(c) Each party must serve copies of all materials submitted on all other parties.

**4A:2-1.7 Specific appeals**

(a) For specific appeal procedures see:

1. Awards in State service (N.J.A.C. 4A:6-6.10);
2. Classification (N.J.A.C. 4A:3-3.9);
3. Discipline, major (N.J.A.C. 4A:2-2.1 et seq.);
4. Discipline, minor (N.J.A.C. 4A:2-3.1 et seq.);
5. Discrimination in State service (N.J.A.C. 4A:7-3.2 through [4A:7-3.4] 4A:7-3.3);
6. Employment list removal for medical reasons (N.J.A.C. 4A:4-6.5);
7. Employment list removal for psychological reasons (N.J.A.C. 4A:4-6.5);
8. Examinations (N.J.A.C. 4A:4-6.1 et seq.);
9. Grievances (N.J.A.C. 4A:2-3.1 et seq.);
10. Layoffs (N.J.A.C. 4A:8-2.6);
11. Overtime in State service (N.J.A.C. 4A:3-5.10 et seq.);
12. Performance Assessment Review in State service (N.J.A.C. 4A:6-5.3);
13. Reprisals (N.J.A.C. 4A:2-5.1 et seq.);
14. Resignations (N.J.A.C. 4A:2-6.1 et seq.);
15. Salary (job reevaluation) in state service (N.J.A.C. 4A:3-4.3);
16. Sick leave injury in State service (N.J.A.C. 4A:6-1.7); and
17. Supplemental compensation on retirement in State service (N.J.A.C. 4A:6-3.4).

(b) Any appeal not listed above must be filed in accordance with N.J.A.C. 4A:2-1.1.

**4A:2-2.1 Employees covered**

(a) This subchapter applies only to permanent employees in the career service or a person serving a working test period.

(b) Appointing authorities may establish major discipline procedures for other employees.

(c) When the State of New Jersey and the majority representative have agreed pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3, to a procedure for appointing authority review before a disciplinary action is taken against a permanent employee in the career service or an employee serving a working test period, such procedure shall be the exclusive procedure for review before the appointing authority.

(d) When the State of New Jersey and the majority representative have agreed pursuant to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3, to a disciplinary review procedure that provides for binding arbitration of disputes involving a disciplinary action which would be otherwise appealable to the Board under N.J.A.C. 4A:2-2.8, of a permanent employee in the career service or a person serving a working test period, such procedure shall be the exclusive procedure for any appeal of such disciplinary action.

**4A:2-2.2 Types of discipline**

(a) Major discipline shall include:

1. Removal;
2. Disciplinary demotion;
3. Suspension or fine for more than five working days at any one time;

[4. Suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year prior to the last suspension or fine is 15 working days or more.

5. The last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year.]

(b) See N.J.A.C. 4A:2-2.9 for minor disciplinary matters that are subject to a hearing, and N.J.A.C. 4A:2-3 for all other minor disciplinary matters.

(c) The length of a suspension in a Final Notice of Disciplinary Action, a Board decision or a settlement, when expressed in “days,” shall mean working days, unless otherwise stated.

#### **4A:2-2.7 Actions involving criminal matters**

(a) When an appointing authority suspends an employee based on a pending criminal complaint or indictment, the employee must be served with a Preliminary Notice of Disciplinary Action. The notice should include a statement that N.J.S.A. 2C:51-2 may apply to the employee, and that the employee may choose to consult with an attorney concerning the provisions of that statute.

1. The employee may request a departmental hearing within five days of receipt of the Notice. If no request is made within this time, or such additional time as agreed to by the appointing authority or as provided in a negotiated agreement, the appointing authority may then issue a Final Notice of Disciplinary Action under (a)3 below. A hearing shall be limited to the issue of whether the public interest would best be served by suspending the employee until disposition of the criminal complaint or indictment. The standard for determining that issue shall be whether the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

2. The appointing authority may impose an indefinite suspension to extend beyond six months where an employee is subject to criminal charges as set forth in N.J.A.C. 4A:2-2.5(a)2, but not beyond the disposition of the criminal complaint or indictment.

i. Where an employee who has been indefinitely suspended enters Pre-Trial Intervention (PTI) or has received a conditional discharge, the criminal complaint or indictment

shall not be deemed disposed of until completion of PTI or until dismissal of the charges due to the employee's satisfaction of the conditions in a conditional discharge, as the case may be.

ii. An appointing authority may continue an indefinite suspension until completion of PTI or until satisfaction of the conditions imposed in a conditional discharge. If an appointing authority chooses not to continue an indefinite suspension during the PTI period or during the period of conditional discharge, it may restore the employee to employment or initiate disciplinary action against the employee.

3. Where the appointing authority determines that an indefinite suspension should be imposed, a Final Notice of Disciplinary Action shall be issued stating that the employee has been indefinitely suspended pending disposition of the criminal complaint or indictment.

(b) When a court has entered an order of forfeiture pursuant to N.J.S.A. 2C:51-2, the appointing authority shall notify the employee in writing of the forfeiture and record the forfeiture in the employee's personnel records. The appointing authority shall also forward a copy of this notification to the Department of Personnel.

1. If the criminal action does not result in an order of forfeiture issued by the court pursuant to N.J.S.A. 2C:51-2, the appointing authority shall issue a second Preliminary Notice of Disciplinary Action specifying any remaining charges against the employee upon final disposition of the criminal complaint or indictment. The appointing authority shall then proceed under N.J.A.C. 4A:2-2.5 and 2.6.

(c) Where an employee has pled guilty or been convicted of a crime or offense which is cause for forfeiture of employment under N.J.S.A. 2C:51-2 but the court has not entered an order of forfeiture, the appointing authority may seek forfeiture by applying to the court for an order of

forfeiture. The appointing authority shall not hold a departmental hearing regarding the issue of the applicability of N.J.S.A. 2C:51-2. If the court declines to enter an order of forfeiture in response to the appointing authority's application, the appointing authority may hold a departmental hearing regarding other disciplinary charges, if any, as provided in (b)1 above.



#### **4A:2-2.9 Board hearings**

(a) Requests for a Board hearing will be reviewed and determined by the Commissioner or Commissioner's designee.

(b) Major discipline hearings will be heard by the Board or referred to the Office of Administrative Law for hearing before an administrative law judge. Minor discipline matters will be heard by the Board or referred to the Office of Administrative Law for a hearing before an administrative law judge for an employee's last suspension or fine for five working days or less where the aggregate number of days the employee has been suspended or fined in a calendar year, including the last suspension or fine, is 15 working days or more, or for an employee's last suspension or fine where the employee receives more than three suspensions or fines of five working days or less in a calendar year. See N.J.A.C. 1:1 for OAL hearing procedures.

1. Where an employee has pled guilty to or been convicted of a crime or offense which is cause for forfeiture of employment under N.J.S.A. 2C:51-2, but the court has not issued an order of forfeiture, the Board shall not refer the employee's appeal for a hearing regarding the applicability of N.J.S.A. 2C:51-2 nor make a determination on that issue. See N.J.A.C. 4A:2-2.7.

2. Where a court has entered an order of forfeiture, and the appointing authority has so notified the employee, but the employee disputes whether an order of forfeiture was actually entered, the Board may make a determination on the issue of whether the order was actually entered. See N.J.A.C. 4A:2-2.7.

3. Notwithstanding (b)1 and 2 above, the Board may determine whether an individual must be discharged from a State or local government position due to a permanent disqualification from public employment based upon the prior conviction of a crime or offense involving or

touching on a previously held public office or employment, provided, however, that the Attorney General or county prosecutor has not sought or received a court order waiving the disqualification provision. See N.J.S.A. 2C:51-2(d) and (e).

(c) The Board may adopt, reject or modify the recommended report and decision of an administrative law judge. Copies of all Board decisions shall be served personally or by regular mail upon the parties.

(d) The Board may reverse or modify the action of the appointing authority, except that removal shall not be substituted for a lesser penalty.